

**STATE OF MINNESOTA
IN SUPREME COURT
No. C4-85-1848**

**Comments of the Silha Center for the Study of Media Ethics and Law on the Proposed
Rules of Public Access to Records of the Judicial Branch**

The Silha Center for the Study of Media Ethics and Law submits the following comments to the Supreme Court of Minnesota in response to the notice for a public hearing to consider the proposed amendments to the Rules of Public Access to Records of the Judicial Branch (“Rules of Public Access”) as set forth in the Final Report of the Advisory Committee to the Supreme Court of Minnesota (“Final Report”).

The Silha Center for the Study of Media Ethics and Law is a research center located within the School of Journalism and Mass Communication at the University of Minnesota. Its primary mission is to conduct research on, and promote understanding of, legal and ethical issues affecting the mass media. The Silha Center also sponsors an annual lecture series; hosts forums, conferences and symposia; produces the *Silha Bulletin*, a quarterly newsletter, and other publications; and provides information about media law and ethics to the public.

INTRODUCTION

The Silha Center again applauds the underlying presumption in the Final Report on the Rules of Public Access that court records are public documents that should be accessible to the public. The Silha Center also reiterates the points addressed in its written comments and the oral presentation by Professor Jane Kirtley on the Preliminary Report of the Advisory Committee.

- Information that is public in one format should not become confidential when it is converted to another format.

- Redacting court records is feasible using current technology.
- Remote access to court records would reduce administrative burdens on court administrators, not increase them.
- Public access to court records must be equal and widely available to ensure that the public can gain full and accurate knowledge of court activities.
- Open and broad public access to court records ensures public oversight and scrutiny of the judiciary.

The Silha Center also urges that the Rules of Public Access be modified to provide broader remote public access to court records.

- Potential misuse of records should not limit public access to court records.
- All court records publicly available should also be available for bulk distribution electronically.

ANALYSIS

I. COURT RECORDS AVAILABLE TO THE PUBLIC IN ONE MEDIUM SHOULD BE AVAILABLE TO THE PUBLIC BY REMOTE ACCESS.

The proposed Rules of Public Access limit remote access to court documents, even though they are publicly available in other mediums. Rule 8, subd. 1(a). The Rules of Public Access allow remote access to only five specific types of records: registers of actions; calendars; indexes; judgment dockets; and judgments, orders, appellate opinions and notices prepared by the court. Rule 8, subd. 1(a)(1)- (5). Preconviction records are also proposed to be made available online. However, the proposed Rules of Public Access would require implementation of technology to block the use of automated tools to search preconviction records by defendant name. Rule 8, subd. 1(c).

a. Remote Access will Benefit Members of Minority Communities, Which Include Concerned Citizens and Victims, as well as Accused Perpetrators of Crimes.

Among the justifications for restricting remote access to court records publicly available at the courthouse, the Final Report discusses the possible disproportionate impact that preconviction records might have on communities of color. *Final Report*, 12-14. It is true, as the Final Report states, that minorities are disproportionately arrested, prosecuted and convicted of longer sentences than whites. *Id.* at 12, 13. It is also possible that landlords and employers might improperly use preconviction records to deny housing and employment opportunities.

However, the Advisory Committee did not discuss the fact that minorities are also more likely to be the victims of crimes than are whites. According to the 1999 Annual Crime Report released by the Saint Paul Police Department, 65% of homicide victims in the city of Saint Paul were African-American and 7% were Asian, while only 7% were white. *1999 Crime Report*, Saint Paul Police Department, 11 (2000). In 1998, 42% of homicide victims were African-American while 29% were Asian and another 29% were white. *Id.* According to the 2000 United States Census, African-Americans comprised approximately 11% of the population of Saint Paul while Asians accounted for 12% of the population. *1990 to 2000 St. Paul Census Comparison Report*, Saint Paul Police Department, Research and Development Unit (2001). Similar percentages existed for other violent crimes including aggravated assault, robbery and rape in the city of Saint Paul. *1999 Crime Report*, at 13-17. Likewise, similar disparities in the proportion of homicide victims across the state of Minnesota exist. See *Minnesota Homicides 1985 to 1997*, Minnesota Planning, 13, 14 (1999).

Placing many or all court records online allows all individuals to access those records relatively easily and inexpensively. Minorities, who are disproportionately affected by crime, would directly benefit from this broad online access to court records. Greater online access would empower minority victims of crime, providing them with information on the progress and disposition of cases affecting them and their communities while also facilitating a better understanding of and respect for the judicial system.

b. Greater Public Access to Court Records Strengthens and Improves the Judicial System, and Should Not be Abridged Based on Concerns about Potential Misuse.

A full and clear public understanding of the judicial system cannot exist unless the public has complete and broad access to court records. Remote access to court records makes them more widely available at lower cost to the public. Concerns over the potential misuse of court records should not result in denial of access to those records.

Decisions on how best to regulate use of court records obtained by remote access are best left to the Legislature, because this area can be both complex and dynamic. As Exhibit I on Bulk Data Alternative 1 in the Final Report points out, several laws at both the federal and state level already impose requirements for the use of records possessed by a third party, such as the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., and the Minnesota Credit Reporting Law, Minn. Stat. §§ 13C.001-.04 (2003). *Id.* at 16, FN 119. Similar laws governing the use of preconviction records could be drafted to impose similar requirements on those using preconviction records. At the same time, the Court's own Rules on Public Access should allow the broadest possible public remote access.

Public access to preconviction records can help to identify problems in the judicial system. Information on disproportionate arrest and prosecution rates of minorities can help shed

light on these issues and educate the public. A better understanding of the judicial system and potential problems within it empowers members of the public to actively engage in overseeing judicial institutions, while also enabling them to work as knowledgeable partners to strengthen the system. Access to presumptively public records should not be curtailed because of theoretical concerns about undefined “misuse.”

II. BULK DATA ALTERNATIVE 2 OF THE FINAL REPORT PROVIDES THE BETTER SOLUTION TO DEALING WITH ELECTRONIC BULK DATA.

In the Final Report, the Advisory Committee states that it “believes that it is appropriate and sufficient to note that the recommendation regarding what court records should be released in bulk format is contested and that the committee is closely divided on the issue.” *Final Report*, 19. This division resulted in three proposed alternatives for handling the bulk distribution of electronic case records. The second alternative closely tracks the language of the bulk distribution rule set out in Section 4.30 of the Conference of Chief Justices and Conference of State Court Administrator Guidelines for Policy Development by State Courts (“CCJ/COSCA Guidelines”), which the Advisory Committee was charged with considering, and is the best of the three proposed alternatives.

The Advisory Committee’s Final Report mentions that the preliminary report of the committee endorsed making only those records publicly available on the Internet available for bulk distribution to the public. The first and third alternatives embody this view on bulk data and unduly restrict access to only those records already remotely accessible. This perpetuates unequal access to such records and does nothing to ensure that the records, once obtained, are used properly.

Moreover these alternatives create more problems than solutions. Commercial brokers already have the ability and resources to collect bulk data directly from the courthouses. This

results in data being made available to the public online through third parties, typically for a fee, because individuals cannot collect such records themselves without great expenditure of both time and money. Making only select information available for release in bulk format over the Internet, as the first and third bulk data alternatives recommend, helps to perpetuate this unequal access to court records. It would ensure that only commercial data brokers will continue to collect and distribute many bulk records. Moreover, there would be no safeguards on the use of that bulk data and no guarantees as to the accuracy or currency of those records.

A rule allowing broad access to bulk records through the Internet can help remedy these problems. Instead of requiring many bulk records to be obtained in person and in paper form, making all bulk data publicly available online would allow the transmission of those records at very little cost. Limiting access to court records because of concerns over the potential misuse of those records is bad policy.

If the misuse of records presents a genuine threat, then other forums are better suited to regulate the use of those records. As discussed above, courts should provide broad public access to court records and allow the Legislature to take necessary steps to correct any potential misuse of those records. In this case, the Legislature could consider taking steps to restrict the use of court records obtained in bulk. The Legislature might also consider imposing statutory requirements on how often bulk data must be updated by third parties holding such data. As discussed in the Commentary to Section 4.30 of the CCJ/COSCA Guidelines, liability for improper release or use of bulk court records could be established by law as well.

CONCLUSION

The Silha Center respectfully requests the Supreme Court to adopt Rules of Public Access that allow broader public access to court records online. Even though the judicial system

arguably has a disproportionate adverse impact on minorities, an easily-accessible system better addresses those issues by encouraging public oversight and enabling a more thorough public understanding of the judicial system. Both the judicial system and individual citizens benefit from increased transparency. In addition, bulk distribution of all court records by remote access allows broader public access to those records. Although the potential misuse of such data may create legitimate concerns, limiting access to court records because of such theoretical concerns is questionable public policy. All court records that are publicly available should be available by remote access as well. Rather than preempting lawful access, the court should leave to the Legislature to decide how best to create any liability for subsequent use of court records.

Respectfully submitted,

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